



- (1) Whether claimant suffered accidental injury arising out of and in the course of his employment with respondent through a series of accidents culminating on April 4, 1996.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board finds claimant has not proven by a preponderance of the credible evidence his entitlement to benefits for the injuries alleged with respondent on March 17, 1995, and for a series of accidents beginning on September 12, 1995, up to and including April 4, 1996.

Claimant alleges an injury to his back during the night shift on the night of September 12-13, 1995. At different times he advised different people the injury caused him concern at work, did not manifest itself at work but later manifested itself that evening at home when he tried to get out of a chair, or did not manifest itself until the next morning when he awoke and had difficulty getting out of bed. Medical reports indicate claimant alleged his back pain pre-dated the date of injury by at least two days. Medical reports also indicated claimant had numerous back injuries and problems pre-dating the September 1995 date of injury, including an injury playing basketball in April 1995.

Claimant requested short-term disability benefits from respondent and, when filling out the reports, did not indicate a work-related injury. When Alice Hewitt, a nurse for respondent, inquired regarding claimant's back complaints, she was told he did not hurt his back at work.

Claimant filled out an "Application for Illness and Accident Plan Benefits" dated September 19, 1995, which specifically denied a work-related connection to his injury.

Claimant's employment with respondent was terminated on or about April 4, 1996, due to excessive absenteeism. Claimant did not advise respondent of ongoing back complaints or a work-related injury until several weeks later, on May 25, 1996.

In proceedings under the Workers Compensation Act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501, as amended, and K.S.A. 44-508(g), as amended. Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to that particular case. Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan. 1042 (1984).

The evidence provided by claimant to support his contention that he suffered an accidental injury arising out of and in the course of his employment with respondent is

sketchy. In order for claimant's story to be believed, claimant's testimony must be accepted over numerous forms placed into evidence from both medical providers and respondent. Claimant made several contradictory statements to employees of respondent and to medical providers regarding the date of the alleged injury and the circumstances surrounding the alleged injury.

The Administrative Law Judge had the opportunity to observe certain witnesses during live testimony. The Appeals Board does not have this opportunity and must defer to the judgement of the Administrative Law Judge in assessing the credibility of the testimony. In this matter, the Administrative Law Judge found claimant to be a credible witness finding that he did suffer accidental injury arising out of and in the course of his employment with respondent with an injury date of April 4, 1996, the last date claimant worked. In so finding, he also found that claimant's written claim filed May 31, 1996, was within 200 days of the date of accident as is required by K.S.A. 44-520a. The Appeals Board will give deference to the Administrative Law Judge regarding this issue.

However, the Administrative Law Judge went on to deny claimant benefits finding that claimant had not given notice within 10 days of the date of accident and further finding that no just cause existed for claimant's failure to give notice pursuant to K.S.A. 44-520.

K.S.A. 44-520 states in part:

"[P]roceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

Claimant does not allege that he was physically unable to give such notice but instead relies on subsections (a) and (b). He argued that respondent had actual knowledge of the accident as claimant discussed his problems with respondent's nurse in September 1995. A review of the evidence indicates that, while claimant did indicate he was in pain, there was no notice to the respondent regarding any back injury or any work-related connection to his back symptoms. Claimant's first notice to respondent of an

alleged back injury suffered while at work occurred in May 1996, substantially beyond 10 days from the date of the alleged accident. The Appeals Board cannot find that the respondent had actual knowledge of this alleged accident. Claimant also argued that the employer was unable to receive such notice as respondent's nurse, on the days claimant attempted to notify her, was not there. The Appeals Board finds that difficult to comprehend when respondent's nurse was only absent on two occasions. The remaining days, from September 1995 through April 4, 1996, represented multiple opportunities for claimant to notify respondent or its duly authorized agents of his symptomatology. Claimant failed.

The Appeals Board finds, based upon a review of the evidence, that the Order of Administrative Law Judge Floyd V. Palmer dated August 14, 1996, should be affirmed, and claimant should be denied benefits in the form of medical treatment for an alleged accidental injury occurring through April 4, 1996, for failure to meet the requirements of K.S.A. 44-520.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Floyd V. Palmer dated August 14, 1996, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1996.

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BOARD MEMBER

c: Cynthia J. Patton, Topeka, KS  
Patrick R. Barnes, Topeka, KS  
Floyd V. Palmer, Administrative Law Judge  
Philip S. Harness, Director